



Agenda Date: 6/07/06
Agenda Item: VC

STATE OF NEW JERSEY
Board of Public Utilities
Two Gateway Center
Newark, NJ 07102
www.bpu.state.nj.us

WATER

IN THE MATTER OF THE REQUEST OF ROCK-GW, LLC)
AND EXXONMOBIL RESEARCH AND ENGINEERING)
COMPANY FOR A DETERMINATION THAT THE)
ANTICIPATED PROVISION OF SEWERAGE)
TREATMENT SERVICE BY ROCK-GW, LLC DOES NOT)
CONSTITUTE UTILITY SERVICE PURSUANT TO)
N.J.S.A. 48:2-13)

DECISION AND ORDER

DOCKET NO. WO06050380

(SERVICE LIST ATTACHED)

BY THE BOARD:

By letter dated July 9, 1997, Exxon Research and Engineering, now known as ExxonMobil Research and Engineering Company (Exxon), advised the Board that it owned approximately 650 acres of property in the Borough of Florham Park on which existed, at that time, three office buildings and several smaller outbuildings along with a sewerage treatment facility (Facility) that served those structures. The Facility had all requisite permits from the New Jersey Department of Environmental Protection (DEP) and was operated pursuant to all applicable laws and regulations. Exxon further informed the Board that it intended to sell to a developer, Rock-Florham, LLC (Rock-Florham), a portion of the property containing one of the existing buildings and on which Rock intended to construct an office building not to exceed 180,000 square feet.

In its letter, Exxon asserted that the sale of the property to Rock-Florham and the provision of sewerage service to the existing and proposed buildings by means of the Facility would not constitute "public use" as defined in N.J.S.A. 48:2-13, and, accordingly, requested that the Board determine that it should not be considered a public utility subject to the Board's regulatory authority. By Order dated November 6, 1997, the Board concurred with Exxon. The Board Order further provided that should circumstances change, the Board reserved its right to reevaluate its finding pertaining to the utility status of the facility.

Subsequently, by letter dated October 6, 1998, Exxon advised the Board that it planned to sell an additional portion of the property to Rock-Florham for the construction of two more office buildings totaling approximately 445,000 square feet that, upon completion, would also be

served by the Facility. Exxon further advised the Board that, as was the case in 1998, the Facility: (1) had sufficient excess capacity with which to serve all structures on the property, existing as well as proposed; (2) continued to have all necessary DEP permits; (3) continued to be operated in accordance with all applicable laws and regulations; and (4) did not and would not be providing service to any off-site structures. In its Order dated January 20, 1999, in Docket No. WO98111378, the Board noted that the proposed sale of property to Rock-Florham would not expand the sewerage system beyond the boundaries of the affected property, would not result in an increase in the Facility's capacity and would have no impact on the regulated market related to sewerage services.¹ Accordingly, the Board found that the proposed sale would "...not render [Exxon] a public utility operating sewerage facilities for public use." The Board also directed that, in the event that the Facility is used to serve additional customers within the original 650 acre site or is sold, Exxon shall petition the Board for a determination as to the utility status of the Facility based on then present conditions.

On May 23, 2006, a letter petition dated May 19, 2006, was submitted on behalf of Rock-GW, LLC (Rock-GW) and, with its permission, Exxon. Rock-GW, an affiliate of Rock-Florham, is the contract purchaser of a substantial portion of the property not heretofore sold by Exxon, as well as the Facility which continues to have all required DEP permits and which would, after closing, continue to be operated by an appropriately licensed operator. The filing was made pursuant to the Board's 1999 directive that a petition be filed in the event that any of the property is sold by Exxon.

In the letter submission, Rock-GW informed the Board that subsequent to the Board's 1999 Order, Exxon discontinued its operations on the site and, as a result, vacated its two office buildings and the ancillary outbuildings. Further, the second of the new office buildings planned at the time of that Order has not yet been built. Consequently, the actual use of the Facility has been substantially less than contemplated and at a level far below its capacity.²

Rock-GW further stated that, subsequent to its closing with Exxon, there is a possibility that a portion of the property may be sold to the New Jersey Sports and Exposition Authority (NJSEA) for lease to the New York Jets (Jets) football team for use as an office/training facility. That site would be served by the Facility pursuant to an agreement to be negotiated among Rock-GW, the NJSEA and the Jets. Under the current proposed plan related to the Jets, the total wastewater flows to the Facility will still be substantially below the levels approved by the Board in its 1999 Order.³

Rock-GW also informed the Board that, sometime in the future, it is anticipated that additional development will occur on the subject property that is beyond that contemplated in the Board's prior Orders and the construction of the Jets office/training facility. Rock-GW set forth its intent to notify the Board in advance of any such development and, if it is determined that such development would subject the owner of the Facility to regulation by the Board as a public utility,

¹ The Florham Park Sewerage Authority, which provides sewerage services in most of the Borough, has neither the capacity nor the interest to serve the affected property which is deemed a separate wastewater service area in Florham Park's Wastewater Management Plan.

² Exxon has provided information that, for the period of 1999 through April 2006, the Facility, which has a total capacity of 290,000 gallons per day and is authorized to operate under NJPDES Permit No. NJ0003476 which expires on October 31, 2008, has experienced an average plant effluent flow of 30,763 gallons per day.

³ Rock-GW has indicated that the estimated flow for the Jets office training facility is approximately 12,500 gallons per day.

Rock-GW will seek an appropriate consent from the Borough of Florham Park and submit same to the Board for approval as required by law.

Based on the information submitted, the Board finds the pertinent factors to include the following:

1. After closing, the Facility will be owned by Rock-GW and will serve property owned by Rock-GW and Rock-Florham, its affiliate;
2. A portion of the property may be sold to the NJSEA for lease to the Jets for an office/training facility;
3. All structures to be served by the Facility are located on the original 650 acres owned by Exxon;
4. The Facility will not be expanded and, including the possible addition of the Jets facility, will continue to be operating at a level below its capacity;
5. The operation of the Facility will have no impact on the regulated market related to sewerage services; and
6. The Facility continues to possess all necessary DEP permits and is and will be operated by a duly licensed operator pursuant to all applicable laws and regulations.

The Board further incorporates by reference the legal and factual analysis contained in its January 20, 1999 Order in Docket No. WO98111378 as well as the analysis set out in I/MO the Request of Princeton Bio-Technology Center Condominium for a Determination that its Provision of Sewerage Treatment Services Does Not Constitute Service Pursuant to N.J.S.A. 48:2-13, Docket No. WO04101115, November 19, 2004.

Therefore, the Board, based on the foregoing and on the record in this matter, HEREBY FINDS that the proposed sale of property and the Facility by Exxon to Rock-GW, as described in the submissions to the Board, will not render Rock-GW a public utility operating sewerage facilities for public use subject to regulation by the Board. Rock-GW is further advised that this opinion is limited specifically to the facts presented and that changing conditions, including additional development and an expansion of service beyond those buildings contemplated in the Board's

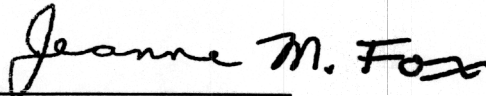
1999 Order and the Jets facility, which must be the subject of a petition filed with the Board in advance of any such development, could subsequently lead to the modification of the Board's opinion. The Board will make a determination at that time based on then present conditions.

DATED:

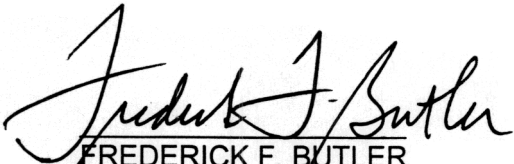
6/7/06

BOARD OF PUBLIC UTILITIES

BY:



JEANNE M. FOX
PRESIDENT



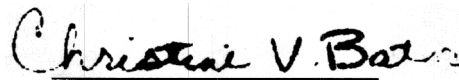
FREDERICK F. BUTLER
COMMISSIONER



CONNIE O. HUGHES
COMMISSIONER



JOSEPH L. FIORDALISO
COMMISSIONER



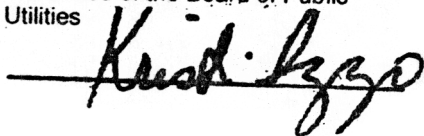
CHRISTINE V. BATOR
COMMISSIONER

ATTEST:



KRISTI IZZO
SECRETARY

I HEREBY CERTIFY that the within
document is a true copy of the original
in the files of the Board of Public
Utilities



**In the Matter of the Request of Rock-GW,LLC and ExxonMobil Engineering and
Research Company for a Determination that its Anticipated Provision of
Sewerage Treatment Services Does Not Constitute Utility Service Pursuant to
N.J.S.A. 48:2-13
BPU Docket No. WO06050380**

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Division of Water
Board of Public Utilities
Two Gateway Center
Newark, New Jersey 07102



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DANZIG
SCHERER
HYLAND
PERRETTI LLP**

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Vincent J. Sharkey, Jr.
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ATTORNEYS AT LAW

May 19, 2006

Ms. Kristi Izzo, Secretary
New Jersey Board of Public Utilities
Two Gateway Center
Newark, New Jersey 07102

WO 06050320

Re: Exxon Research and Engineering Property
Lots 1, 3, 4 and 5, Block 1401; Lot 1, Block 1402 Florham Park
Lots 1 and 4, Block 401 Madison (collectively, the "Property")

Dear Ms. Izzo:

My firm represents Rock-GW, LLC ("Rock"), the contract purchaser of a substantial portion of the referenced Property. I am writing on behalf of Rock and, with its permission, ExxonMobil Foundation and ExxonMobil Research and Engineering Company ("Exxon"), the original owners of the Property, which contains a private sewer treatment facility (the "Facility") which provides wastewater treatment services to the Property. The Facility was the subject of an Order by the Board on January 20, 1999, in Docket No. WO98111378 (the "1999 Order") confirming that the sale of a portion of the Property in 1999 did not subject the Facility to regulation by the Board as a public utility. The 1999 Order required Exxon, in the event of the transfer of ownership of the Property or the Facility, to file a petition with the Board prior to transfer. Please accept this letter in lieu of a more formal filing as contemplated in the 1999 Order.

By way of background, at the time the 1999 Order was issued, the Property was occupied by four office buildings, several smaller outbuildings and the Facility. Two of those buildings and the outbuildings had been utilized by Exxon, and the other two had been sold to and/or constructed by Rock-Florham LLC ("Rock-Florham"). In or about 1998, Exxon contracted to sell to Rock-Florham an additional portion of the Property for the construction of two additional office buildings totaling approximately 445,000 square feet. Wastewater collection and treatment service was to be provided to the two new buildings, as well as all existing buildings on the Property, by the Facility. At the time, Exxon had, and continues to have, all requisite permits from the New Jersey Department of Environmental Protection, to operate the Facility.

In reviewing the matter, the Board noted that the proposed sale of the property to Rock-Florham would not result in any increase in the capacity of the Facility and no impact on the regulated market relating to sewerage services. 1999 Order, at 3. The Board determined that the proposed transfer did not expand the Facility in a way which would impact the regulated market in the future, and there was no planned expansion of the Facility beyond the boundaries of the Property originally owned by Exxon. Ibid. After so finding, the Board concluded that ownership and operation of the Facility was not for "public use" and not subject to public utility regulation.

Subsequent to the 1999 Order, Exxon discontinued its operations on the site. As a result, its two office buildings and the ancillary outbuildings have been vacated. Further, the second of the new office buildings contemplated at the time of the 1999 Order has not yet been built. Consequently, use of the Facility has been substantially less than contemplated in the 1999 Order, and far below the capacity of the Facility.

Rock is under contract to purchase from Exxon a substantial portion of the Property not heretofore sold by Exxon, as well as the Facility. Naturally, operation of the Facility will continue to be by an entity duly licensed and approved by DEP, probably by an affiliate of NJ American Water, Applied Water Management, Inc.

The only immediate change in use of the Property from that already considered by the BPU in the 1999 Order which may occur after closing on the Rock purchase is the possible sale of a portion of the site to the New Jersey Sports and Exposition Authority ("NJSEA") for lease to the New York Jets football team for use as an office/training facility, about which there has been much talk in the press these last few months. If that transaction occurs (and it must close quickly, if at all), wastewater treatment service will be provided to the site from the Facility, pursuant to an agreement to be negotiated among Rock, NJSEA and the Jets. However, there will be no extension of sewer facilities beyond the limits of the Property, and there are no plans to do so in the future. Moreover, as was the case in 1999, the Florham Park Sewerage Authority, which provides sewerage services in most of the rest of the Borough, has neither the capacity nor the interest to serve the Property, which is deemed a separate wastewater service area (titled, appropriately, the Exxon Research and Engineering Company Service Area) in Florham Park's Wastewater Management Plan. Under the current proposed plan to develop a portion of the Property for a Jets training facility the total wastewater flows to the Facility will still be substantially below the levels contemplated and approved by the Board in the 1999 Order.

In sum, the only changes in the use of the Facility beyond those contemplated and approved in the 1999 Order are:

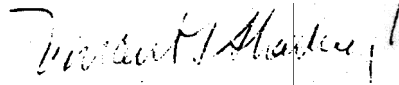
- (i) discontinuance of Exxon's operations on the site and vacation of its buildings;

- (ii) construction of only one of the two office buildings which were the subject of the 1999 Order; and
- (iii) planned construction of the Jets training facility as discussed herein.

In the future, it is anticipated that additional development will occur on the Property beyond that contemplated in the 1999 Order and construction of the Jets training facility. Rock hereby agrees to notify the Board in advance of any such development. If it is determined by the Board that such development would subject the owner/operator of the Facility to regulation by the Board as a public utility, Rock will cause a petition to be filed with the Borough of Florham Park for approval of a franchise for the owner/operator of the Facility, and review of any such approval by the Board, as required by law.

Both Rock and Exxon are available at your earliest convenience to discuss this matter and/or provide any additional information the Board may require.

Respectfully submitted,


Vincent J. Sharkey, Jr.

VJS:ob

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STATE OF NEW JERSEY
Board of Public Utilities
Two Gateway Center
Newark, NJ 07102

AGENDA DATE: 1/20/99

IN THE MATTER OF THE REQUEST OF)	<u>WATER AND WASTEWATER</u>
EXXON RESEARCH AND ENGINEERING)	
COMPANY FOR A DETERMINATION THAT)	<u>DECISION AND ORDER</u>
ITS PROVISION OF SEWERAGE TREATMENT)	
SERVICES DOES NOT CONSTITUTE)	
UTILITY SERVICE PURSUANT TO)	
<u>N.J.S.A. 48:2-13</u>)	BPU Docket No. WO98111378

Pitney, Hardin, Kipp & Szuch, Morristown, New Jersey, by Paul E. Flanagan,
Esq. on behalf of Exxon Research and Engineering Company

BY THE BOARD

By letter dated October 6, 1998, Exxon Research and Engineering ("ER&E") advised the Board of Public Utilities ("Board") that it was in negotiations to sell an additional portion of its property for the construction of two more office buildings onsite. The sale of real property is to Rock-Florham, the same developer that purchased land that was the subject of a November 6, 1997 Board Order. Rock-Florham, plans to construct two office buildings with a total of 445,200 square feet. With the construction of said buildings, ER&E states that the sewerage treatment plant will be operating within its capacity as determined by the Department of Environmental Protection.

By way of background, on July 9, 1997, ER&E informed the Board that it owned approximately 650 acres of real property on which existed three office buildings and several smaller buildings, along with a sewerage treatment facility which serves these structures. ER&E further informed the Board in its July 9, 1997 letter of its intention to sell a portion of its real property to a developer, which included the portion of land containing one of the existing buildings. The developer was to construct an office building not to exceed 180,000 square feet.

Since ER&E would be providing service to an entity other than itself, a question arose as to whether ER&E could be construed as a public utility. ER&E asserted that the sale of the property and the provision of sewerage service to the two structures (one existing and one to be built) would not constitute "public use" as defined in N.J.S.A. 48:2-13. Consequently, ER&E contended that it should not be considered a public utility subject to the jurisdiction of the Board.

The Board, by Order dated November 6, 1997, concurred with ER&E. The Board ruled that the continued provision of sewerage service within the confines of the original onsite property did not warrant a finding that the ER&E sewerage treatment facility was being operated for "public use." The Board Order further stated that, if ER&E had a change in circumstances, the Board reserved its right to reevaluate its finding pertaining to the utility status of the facility.

A determination as to whether an entity is a public utility must be based on the provisions of N.J.S.A. 48:2-13 and relevant case law. N.J.S.A. 48:2-13 provides in pertinent part:

The term "public utility" shall include every individual, copartnership, association, corporation or joint stock company, their lessees, trustees or receivers appointed by any court whatsoever, ... that now or hereafter may own, operate, manage or control within this State any ... pipeline, gas, electric light, heat, power, water, oil, sewer, solid waste collection, solid waste disposal, telephone or telegraph system, plant or equipment for public use, under privileges granted or hereafter to be granted by this State or by any political subdivision thereof.

[emphasis supplied]

In this case, it is clear that ER&E is operating the kind of plant listed in the statute and that it is also operating under privileges granted either by the state or one of its subdivisions. Therefore, the only remaining issue is whether the proposed sale of property to Rock-Florham will cause ER&E to become a public utility operating for public use as that term has been interpreted under New Jersey law.

New Jersey courts have held that a decision on public use "depends upon the character and extent of the use and not upon agreements or understandings between the supplier and those supplied." Lewandowski v. Brookwood Musconetcong River Ass'n., 37 N.J. 431, 445 (1962). In addition, it is necessary to consider "present and potential use, and all other facts and circumstances associated with the operation." Alexander Hamilton Sav. & Loan Assoc. v. Dunn & Dunn, 70 PUR 3d 58, 61 (N.J. 1967). Therefore, by necessity, the question as to whether there is public use must be decided on a case-by-case basis. See, Petition of South Jersey Gas Co., 116 N.J. 268 (1989) (hereinafter "SunOlin"). In addition, the Board is guided by various factors including but not limited to the following: (1) whether a significant number of retail customers are being served; (2) whether the facilities are located in public streets and/or whether other public resources are utilized; (3) whether the company provides meters and/or charges separately for its service; (4) whether and to what extent there is an economic impact on the regulated market; and (5) whether there is a potential for expansion. Freehold Water and Utility Co. v. Silver Mobile Home Park, 68 PUR 3d 523, 527 (1967); Alexander Hamilton Sav. & Loan Assoc. v. Dunn & Dunn, *supra* at 61; See, SunOlin, *supra*; Lewandowski, *supra* at 445.

The existing pipeline crosses under Route 24, which technically means that some of the facilities are located in a public street. However, use of a right-of-way by itself does not necessarily give rise to a finding of public use if there are no other factors which make it necessary for the Board to regulate the entity as a public utility. For example, In the Matter of the Joint Petition of General Motors Corp. (Linden) and Quixx Corporation for a Declaratory Ruling that the Quixx/General Motors Congeneration Project is Not a Public Utility, Docket No. EE95100486 at 17 (July 15, 1996), the Board determined that a proposed connection pipeline which would if constructed traverse several public roads, and a proposed power connection line which would cross at least one public road, was not a network of pipes to a number of customers such that it had the character of a public utility operation. Thus, because Petitioners proposed in Quixx that there would be only two customers, the Board determined that the proposed use of the public rights-of-way did not by itself give rise to a finding that the system would have the character of a public utility operation. Similarly, it is clear in the within matter that ER&E is not operating a network of pipes to a number of customers in a manner similar in character to what is associated with the provision of utility services. Moreover, the line under Route 24 was in existence before construction of that highway and before the sale of the property in question to Rock-Florham. Therefore, we believe that the crossing of a public road in this case is not an indication of public use.

For similar reasons, the existence of meters does not by itself give rise to a finding of public use. In this regard, the Board believes that the fact that there are metered charges is not sufficient in this case for a showing of public use, absent the presence of other important indicia of public use such as a network of pipes or a significant increase in the number of customers served. See, Quixx, supra at 15.

There remains the issue of economic impact on the regulated market and the corollary issue as to whether the system as described has the capacity which would allow it to expand its operations in a manner constituting public use. It is clear from the record that there will be no increase in the capacity of ER&E's sewerage plant as a result of the proposed sale of the property and no impact on the regulated market relating to sewerage services. In addition, there is no information in this case which indicates a pattern or plan to expand the ER&E's facilities in a manner which would have an impact on the regulated market. The Board notes that this situation is considerably different than the situation considered by the Supreme Court of New Jersey in the SunOlin case. Petition of South Jersey Gas Company, supra. In that case, the Court found that SunOlin, a purveyor of significant quantities of methane-rich gas to only one high volume customer had the capacity and desire to replace up to two-thirds of South Jersey Gas Company's firm industrial load and was thereby operating for public use. In this case, the sale of the property to Rock-Florham will not result in an expansion of the sewerage system beyond the boundaries of the property originally owned by ER&E, and a review of the information submitted by ER&E shows that no such expansion is contemplated or practical.

There have been discussions in the newspapers recently regarding the merger of Exxon and Mobil and in particular a closing of an Exxon facility in Florham Park, New Jersey. By letter dated December 2, 1998, ER&E informed Board Staff that the Exxon Florham Park closing

referenced in the December 2, 1998 Star Ledger article is the closing of a facility of Exxon Company International, which is a division of Exxon Corporation. ER&E is an independent affiliated Exxon Company. Accordingly, the closure discussed does not involve ER&E or its operations in Florham Park.

In view of the foregoing, the Board HEREBY FINDS that the proposed sale of property by ER&E to Rock-Florham will not render ER&E a public utility operating sewerage facilities for public use.

Should the sewerage treatment plant owned and operated by ER&E subsequently be used to serve additional customers or structures within the original 650 acre site, or should said sewerage treatment plant be sold to another entity, ER&E shall file a petition with the Board prior to the provision of such additional service or change in ownership in which it shall seek a Board determination pertaining to the utility status of the plant and related facilities. The Board will make its determination in this regard based on then present conditions.

DATED: *January 20, 1999*

BOARD OF PUBLIC UTILITIES

BY:

[Signature]
HERBERT H. TATE
PRESIDENT

[Signature]
CARMEN J. ARMENTI
COMMISSIONER

ATTEST:

[Signature]
MARK W. MUSSER
SECRETARY



STATE OF NEW JERSEY
Board of Public Utilities
Two Gateway Center
Newark, NJ 07102

AGENDA DATE: 11/6/97

WATER AND WASTEWATER

IN THE MATTER OF THE REQUEST OF)
EXXON RESEARCH AND ENGINEERING)
COMPANY FOR A DETERMINATION THAT)
ITS PROVISION OF SEWERAGE TREATMENT)
SERVICES DOES NOT CONSTITUTE UTILITY)
SERVICE PURSUANT TO N.J.S.A. 48:2-13)

DECISION AND ORDER

Pitney, Hardin, Kipp & Szuch, Morristown, New
Jersey, by Paul E. Flanagan, Esq., on behalf of
Exxon Research and Engineering Company

BY THE BOARD:

By letter dated July 9, 1997, Exxon Research and Engineering Company ("ER&E") advised the Board of Public Utilities ("Board") that ER&E currently owns approximately 650 acres of real property situated in the Borough of Florham Park in the County of Morris upon which are located three existing office buildings, several small outbuildings and a sewerage treatment facility which serves the aforementioned structures.

ER&E further indicated that it presently occupies two of the office buildings while the third is leased to AT&T. ER&E also advised the Board that it is now under contract to sell a portion of the site, including the leased building and sufficient land upon which to construct an additional building of up to 180,000 square feet that would also be leased to AT&T and would be connected to the servicing sewerage treatment facility. ER&E informed the Board that there are no plans or mains for other users off site of the ER&E property to connect to the subject sewerage treatment facility as the Florham Park Sewerage Authority provides service to the rest of the Borough.

ER&E has stated its position that the sale of the aforementioned portion of its property and the continued provision of sewerage service to the structures on said property would not constitute "public use." Therefore, ER&E opines that it should not

1
be considered a public utility subject to the jurisdiction of the Board. Based on the facts presented, the Board concurs with the analysis set forth by ER&E. Accordingly, the Board HEREBY DETERMINES and FINDS that the continued provision of sewerage service to the property considered for sale, including the possible addition of another building on said parcel, does not warrant a finding that the ER&E sewerage treatment facility is being operated "for public use" as that term is defined in N.J.S.A. 48:2-13.

As indicated above, the Board's conclusion is based solely on the specific facts set forth in ER&E'S letter of July 9, 1997. In the event that the sewerage treatment plant owned and operated by Exxon Research and Engineering Company is subsequently used to serve additional off site customers, the Board reserves its right to reevaluate its findings pertaining to the utility status of the facility based on then present conditions.

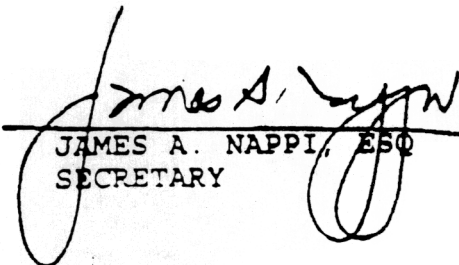
DATED: 11-6-97

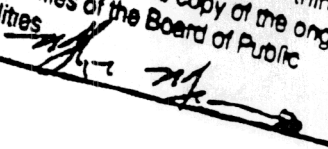
BOARD OF PUBLIC UTILITIES
BY:

HERBERT H. TATE
PRESIDENT

CARMEN J. ARMENTI
COMMISSIONER

ATTEST:


JAMES A. NAPPI, ESQ.
SECRETARY

HEREBY CERTIFY that the within
document is a true copy of the original
in the files of the Board of Public
Utilities




Agenda Date: 11/09/04

Agenda Item: 5C

STATE OF NEW JERSEY

Board of Public Utilities

Two Gateway Center

Newark, NJ 07102

www.bpu.state.nj.us

WATER AND WASTEWATER

IN THE MATTER OF THE REQUEST OF
PRINCETON BIO-TECHNOLOGY CENTER)
CONDOMINIUM FOR A DETERMINATION THAT)
ITS PROVISION OF SEWERAGE TREATMENT)
SERVICES DOES NOT CONSTITUTE SERVICE)
PURSUANT TO N.J.S.A. 48:2-13)

DECISION AND ORDER

DOCKET NO. WO04101115

(SERVICE LIST ATTACHED)

BY THE BOARD

This matter involves a request for guidance (declaratory ruling) as to whether the Princeton Bio-Technology Center Condominium may operate a private sewer system, under the limited circumstances set out below, in the absence of any regulatory oversight by this Board.

As described in various submissions to the Board, Princeton Bio-Technology Center Condominium ("Condominium") is the owner of a sewer system that is meant to provide service that would be limited solely to the owners of five commercial condominium units that comprise the Condominium. The Condominium, which is located in Hopewell Township ("Township") on property formerly owned by Townsend Property Trust Limited Partnership ("Townsend") and designated as Block 40, Lot 14, is managed by a not-for-profit Condominium Association of which each owner will be a member and the sewer plant will be operated and maintained as a common element of the Association. All operating costs will be distributed to the unit owners by means established in the Master Deed or bylaws, based on the unit's relevant percentage of the total actual cost, if metered, or a designated percentage of the total costs, if unmetered. In either scenario, the Condominium will not realize any profits from the system.

The plant, which is located totally within the boundaries of the Condominium's property, has a capacity, as reflected in a New Jersey Pollutant Discharge Elimination System ("NJPDDES") Permit, of 80,000 gpd domestic flow and 48,000 gpd industrial flow which will be allocated by the Association specifically to each unit or based on the unit's relevant square footage. The Condominium has no ownership interest in any land contiguous to the subject property and there are no plans to either expand the plant or provide service to anyone other than the unit owners and their tenants.

The structures that presently exist on each unit are as follows

- Unit 1 - Contains a research/office-use structure currently occupied by Lexicon Pharmaceuticals;
- Unit 2 - Contains no improvements other than a macadam parking lot;
- Unit 3 - Contains an unoccupied office/laboratory structure in the process of being renovated for use;
- Unit 4 - Contains an old farmhouse that has been converted to office space and is currently unoccupied; and
- Unit 5 - Contains no improvements other than the sewer treatment plant.

There is a potential for development on the subject property under a General Development Plan approved by the Township. There is no plan, however, as indicated above, to expand the size of the sewer system.

The plant is operated by Applied Water Management, Inc. ("AWM") under an operational agreement that was entered into between AWM and Townsend, and subsequently assigned to the present owner. The operational agreement has a term of five years ending January 31, 2008.

By letters dated June 14 and July 16, 2004, and through subsequent responses to Staff discovery, the Condominium set out the above-cited description of the sewer system and requested a ruling by the Board that the operation of the system as contemplated would not fall within the Board's regulatory oversight. The Condominium further noted that while the Ewing-Lawrence Sewerage Authority ("ELSA") provides limited sewer service to certain properties in the Township by separate contract, ELSA does not provide any service in the area of the subject property. Accordingly, no regulated entities within or near the Township will be impacted by the private operation of the subject sewer facilities.

After a review of the submissions, the Division of the Ratepayer Advocate, by letter dated November 4, 2004, indicated its position that the operation of the sewer system as contemplated does not fall under the Board's jurisdiction.

The Board would initially note that while N.J.S.A. 48:2-13.2 exempts certain nonpublicly-owned, nonprofit water companies from the Board's jurisdiction¹, no statutory provision exists related to similar entities providing sewer service. The Board is of the opinion that this does not preclude it from looking at each matter on a case-by-case basis and applying the provisions of N.J.S.A. 48:2-13 and all other pertinent provisions within Title 48 in determining whether the operation of a particular facility constitutes the provision of utility service that warrants the exercise of the Board's jurisdiction.²

¹ N.J.S.A. 48:2-13.2 states, in pertinent part:

The provisions of any law, rule, regulation or order to the contrary notwithstanding, with respect to a nonpublicly-owned, nonprofit water company which is exclusively owned and controlled by the consumers it serves, and provided that a majority of the entire membership of the association which controls the water company approves, the Board of Public Utilities shall not exercise any jurisdiction or control over the rates, charges or operations of the company....

² See *I/M/O Alleged Violations of Law by Valley Road Sewerage Company*, 154 N.J. 224, 237 (1998) where the Court state that: "[t]he express grant of power to order the acquisition of small water companies does not detract from the Board's implicit power to seek the sale of small sewerage companies."

A determination as to whether an entity is a public utility must be based on the provisions of N.J.S.A. 48:2-13 and relevant case law. N.J.S.A. 48:2-13 provides in pertinent part

The term "public utility" shall include every individual, copartnership, association, corporation or joint stock company, their lessees, trustees or receivers appointed by any court whatsoever, ...that now or hereafter may own, operate, manage or control within this State any...pipeline, gas, electric light, heat, power, water, oil, sewer, solid waste collection, solid waste disposal, telephone or telegraph system, plant or equipment for public use, under privileges granted or hereafter to be granted by this State or by any political subdivision thereof. (Emphasis added.)

While the subject sewer system is located entirely on private property and does not traverse any public rights-of-way, the system will be operated under privileges granted by the State as a result of the issuance of the NJPDES permit by the New Jersey Department of Environmental Protection ("NJDEP"). The remaining issue, therefore, is whether the operation of the sewer system, as contemplated, is for public use thereby resulting in the need to regulate the Condominium Association as a public utility.

New Jersey courts have held that a decision on public use "depends upon the character and extent of the use and not upon agreements or understandings between the supplier and those supplied." Lewandowski v. Brookwood Musconetcong River Ass'n., 37 N.J. 433, 445 (1962). In addition, it is necessary to consider "present and potential use, and all other facts and circumstances associated with the operation." Alexander Hamilton Sav. & Loan Assoc. v. Dunn & Dunn, 70 PUR 3d 58, 61 (N.J. 1967). Therefore, by necessity, the question as to whether there is a public use must be decided on a case-by-case basis. See, Petition of South Jersey Gas Co., 116 N.J. 268 (1989) (hereinafter "SunOlin"). In addition, the Board is guided by various factors including but not limited to the following: (1) whether a significant number of retail customers are being served; (2) whether the facilities are located in public streets and/or whether other public resources are utilized; (3) whether the company provides meters and/or charges separately for its service; (4) whether and to what extent there is an economic impact on the regulated market; and (5) whether there is a potential for expansion. Freehold Water and Utility Co. v. Silver Mobile Home Park, 68 PUR 3d 523, 527 (1967); Alexander Hamilton Sav. & Loan Assoc. v. Dunn & Dunn, *supra* at 61; See, SunOlin, *supra*; Lewandowski, *supra* at 445.

The Board notes that the operational costs attributable to the sewerage system are to be allocated among the Condominium unit owners and the use of meters, if at all, will merely be to assist in the implementation of that allocation. The Board further notes that no customers, other than the unit owners or potential unit owners, will be solicited. In addition, as indicated above, the system facilities are located entirely on private property and no public resources shall be utilized in the operation of the sewer system.

There remains the issue of economic impact on the regulated market and the corollary issue as to whether the system as described has the capacity that would allow it to expand its operations in a manner constituting public use. It is clear from the record that, at the time of full build-out of the Condominium, there will be no increase in the capacity of the existing sewer system and no impact on the regulated market relating to sewerage services. In addition, there is no information in this matter which indicates a pattern or plan to expand the Condominium's facilities in a manner which would have an impact on the regulated market. The Board notes that this situation is more akin to its decision in I/M/O the Request of Exxon Research and Engineering Company, Docket No. WO98111378 (January 20, 1999), and is different from that

considered by the New Jersey Supreme Court in the SunOlin case. Petition of South Jersey Gas Company, supra. In SunOlin, the Court found that a purveyor of significant quantities of methane-rich gas to only one high volume customer had the capacity and desire to replace up to two-thirds of the regulated local gas distribution company's firm industrial load and was thereby operating for public use. The record in the matter now before the Board, as was the case in the Exxon Research and Engineering Company matter, reflects that no regulated sewer services are now provided in the immediate area and that the existing sewerage system will not be expanded beyond the boundaries of the Condominium's property.

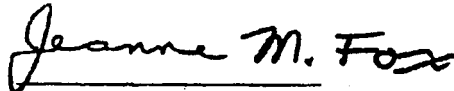
As the system is privately owned and the service to be provided would be solely to a restricted group, namely the owners of the individual units that comprise the Condominium, through an allocation of costs with no profit realized by the Condominium, and based on the character and extent of the service, the Board is of the opinion that the Condominium Association is not the owner of a system that provides service for public use pursuant to N.J.S.A. 48:2-13.

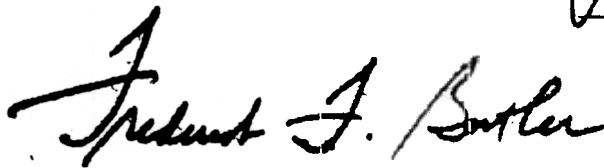
Therefore, the Board, based on the foregoing and on the record in this matter, HEREBY FINDS that the operation of the sewerage system by Princeton Bio-Technology Center Condominium Association, as described in its submissions to the Board, will not render the Condominium Association a public utility operating sewerage facilities for public use subject to regulation by the Board. The Condominium Association is further advised that this opinion is limited specifically to the facts presented and that changing conditions, including an expansion of service beyond the existing buildings, which should be reported immediately to the Board, could subsequently lead to the modification of the Board's opinion.

In order to maintain a consistency with the statutory treatment of other nonpublic, nonprofit associations, the Board conditions its findings in this matter on the receipt of approval from a majority of the Condominium Association members to the provision of sewer service by the Association.

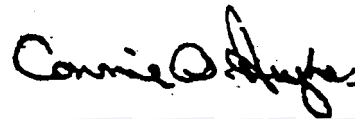
DATED: 11/19/04

BOARD OF PUBLIC UTILITIES
BY:


JEANNE M. FOX
PRESIDENT



FREDERICK F. BUTLER
COMMISSIONER

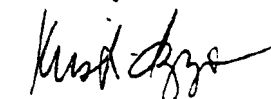


CONNIE O. HUGHES
COMMISSIONER

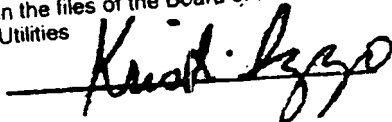


JACK ALTER
COMMISSIONER

ATTEST:


KRISTI IZZO
SECRETARY

I HEREBY CERTIFY that the within
document is a true copy of the original
in the files of the Board of Public
Utilities



I/M/O THE REQUEST OF PRINCETON BIO-TECHNOLOGY CENTER CONDOMINIUM
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